



DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)  
Centers for Medicare & Medicaid Services

Notice of Opportunity for Hearing on Compliance of Arkansas State Plan Provisions Concerning Provision of Benefits During a Reasonable Opportunity Period with Titles XI and XIX (Medicaid) of the Social Security Act

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS

ACTION: Notice of Opportunity for a Hearing  
Compliance of Arkansas Medicaid State Plan – Provision of Benefits During a Reasonable Opportunity Period

CLOSING DATE: Requests to participate in the hearing as a party must be received by the presiding officer by [Insert date 30 days after date of publication in the **Federal Register**].

FOR FURTHER INFORMATION CONTACT:

Benjamin R. Cohen, Hearing Officer  
Centers for Medicare & Medicaid Services  
2520 Lord Baltimore Drive, Suite L  
Baltimore, MD 21244

SUPPLEMENTARY INFORMATION:

This notice announces the opportunity for an administrative hearing concerning the finding of the Administrator of the Centers for Medicare & Medicaid Services (CMS) that the State of Arkansas is not providing Medicaid benefits during a reasonable opportunity period.

Section 1902(a)(46) of the Social Security Act (the Act) requires state plans for medical assistance to provide “that information is requested and exchanged for purposes of income and eligibility verification in accordance with a State system which meets the requirements of section 1137 of this Act.” Section 1137(d) of the Act and regulations at 42 CFR §435.911(c) require that the state agency provide a reasonable opportunity period to individuals who are determined otherwise eligible for Medicaid but for whom the state agency is unable to promptly verify satisfactory immigration status. In its approved State Plan Amendment (SPA) 13-0018, the Arkansas Department of Human Services (DHS) provides assurance that it provides Medicaid to citizens and nationals of the United States and to certain non-citizens, including during a reasonable opportunity period pending verification of their citizenship, national status or satisfactory immigration status, in accordance with the requirements of sections 1902(a)(46), 1902(ee), 1903(x) and 1137(d) of the Act. Despite such assurance in the Medicaid state plan, it is CMS’ understanding based on numerous discussions and interactions with the state that

Arkansas is not providing Medicaid benefits to individuals who declared under penalty of perjury that they are in a satisfactory immigration status, have met all other eligibility requirements for Medicaid in the state, and are pending verification of their immigration status.

With a formal determination by the CMS Administrator that the Arkansas DHS has failed to comply substantially with these requirements, made after a hearing or absent a hearing request, CMS will begin this FFP withholding and it will continue until the Arkansas DHS comes into compliance with the requirement to provide Medicaid benefits during a reasonable opportunity period for otherwise eligible non-citizens who have declared under penalty of perjury that they are in a satisfactory immigration status.

Arkansas submitted state plan amendment (SPA) Transmittal Number 13-0018 on September 23, 2013, which described the Arkansas DHS's policies and practices related to citizenship and non-citizen eligibility, including the assurance that the Arkansas DHS provides Medicaid benefits during the reasonable opportunity period to individuals who have declared under penalty of perjury that they are in a satisfactory immigration status pending verification of such status. During the review of this SPA, CMS learned that the Arkansas DHS was not providing Medicaid benefits during a reasonable opportunity period to individuals who have declared under penalty of perjury that they are in a satisfactory immigration status and who meet all other eligibility requirements in the state, pending verification of such status. Throughout 2014 and 2015, CMS and Arkansas engaged in extensive technical assistance discussions. CMS sent a letter to the Arkansas DHS on April 1, 2015, reiterating the requirement for Arkansas to comply with the statute and regulations. During this time, CMS received multiple draft corrective action plans (CAPs) from Arkansas that set out schedules to come into compliance with section 1137(d) of the Act by July 1, 2014, October 2015, April 2016, and, most recently, August 2016.

On November 3, 2015, CMS approved Arkansas' SPA 13-0018. At the same time, CMS issued a companion letter informing Arkansas that, if it did not demonstrate compliance with these requirements within 30 days of the date of the letter, CMS would initiate formal compliance proceedings. To date, CMS has not received evidence of compliance with the requirement to provide Medicaid benefits to non-citizens during a reasonable opportunity period.

The notice to Arkansas containing the details concerning this compliance issue, the proposed withholding of FFP, opportunity for a hearing, and possibility of postponing and ultimately avoiding withholding by coming into compliance, reads as follows:

Dear Ms. Stehle:

This letter provides notice that the Centers for Medicare & Medicaid Services (CMS) has found a serious issue of noncompliance because the Arkansas Department of Human Services (DHS) is not providing Medicaid benefits during a reasonable opportunity period as required by section 1137(d) of the Social Security Act (the Act) and regulations at 42 CFR. §435.911(c).

Pursuant to section 1904 of the Act and 42 CFR §430.35, a portion of the federal financial participation (FFP) of the administrative costs associated with the operation of the Arkansas Medicaid program will be withheld. However, CMS is first providing the Arkansas DHS with an opportunity for a hearing on this withholding decision. With a formal determination by the CMS Administrator that the Arkansas DHS has failed to comply substantially with these requirements, made after a hearing or absent a hearing request, CMS will begin this FFP withholding and it will continue until the Arkansas DHS comes into compliance with the requirement to provide Medicaid benefits during a reasonable opportunity period for otherwise eligible non-citizens who have declared under penalty of perjury that they are in a satisfactory immigration status. The details of the finding, proposed withholding, opportunity for the Arkansas DHS to request a hearing on the finding, and possibility of postponing, and ultimately avoiding, withholding by coming into compliance are described below.

CMS learned of the Arkansas DHS' non-compliance with section 1137(d) of the Act and regulations at 42 CFR §435.911(c) during the review of State Plan Amendment (SPA) Transmittal Number 13-0018. Section 1902(a)(46) of the Act requires state plans for medical assistance to provide "that information is requested and exchanged for purposes of income and eligibility verification in accordance with a State system which meets the requirements of section 1137 of this Act." Section 1137(d) of the Act requires that the state agency provide a reasonable opportunity period to individuals who are determined otherwise eligible for Medicaid but for whom the state agency is unable to promptly verify satisfactory immigration status. See also, 42 CFR. §435.911(c). In the approved SPA 13-0018, the Arkansas DHS provides assurance that it provides Medicaid to citizens and nationals of the United States and to certain non-citizens, including during a reasonable opportunity period pending verification of their citizenship, national status or satisfactory immigration status, in accordance with the requirements of sections 1902(a)(46), 1902(ee), 1903(x) and 1137(d) of the Act. Despite such assurance in the Medicaid state plan, it is our understanding that the Arkansas DHS is not providing Medicaid benefits to individuals who declare under penalty of perjury that they are in a satisfactory immigration status, meet all other eligibility requirements for Medicaid in the state, and are pending verification of such status.

In processing SPA 13-0018, CMS and the Arkansas DHS discussed this issue on October 10, 2013, and again on December 9, 2013, and the Arkansas DHS acknowledged that it is not furnishing benefits during the reasonable opportunity period to individuals who declare under penalty of perjury that they are in a satisfactory immigration status. A formal Request for Additional Information (RAI) was issued on December 20, 2013, which requested a description of the steps the Arkansas DHS would take to implement the change, a timeline by which the steps would be accomplished and a date by which the changes will be completed to be in compliance with section 1137(d) of the Act. CMS also sent a letter to the Arkansas DHS on April 1, 2015, reiterating the requirement for the Arkansas DHS to comply with the statute and regulations.

Throughout 2014 and 2015, CMS and the Arkansas DHS engaged in extensive technical assistance discussions. During this time, CMS received multiple draft corrective action plans (CAPs) from the Arkansas DHS that set out schedules for compliance with section 1137(d) of the Act, including dates of

compliance by July 1, 2014, October 2015, and April 2016. The Arkansas DHS formally responded to the December 20, 2013, RAI on October 7, 2015. The RAI response included a revised schedule for compliance with section 1137(d) of the Act by April of 2016. On November 3, 2015, CMS approved Arkansas' SPA 13-0018, which describes the Arkansas DHS's policies and practices related to citizenship and non-citizen eligibility, including the assurance that the Arkansas DHS is providing Medicaid benefits during the reasonable opportunity period to individuals who have declared under penalty of perjury that they are in a satisfactory immigration status pending verification of such status. At the same time, CMS issued a companion letter informing the Arkansas DHS that, if it did not demonstrate compliance with these requirements within 30 days of the date of the letter, CMS would initiate formal compliance proceedings. The Arkansas DHS did not come into compliance by the specified date and on February 23, 2016, submitted a revised timeline for compliance with section 1137(d) of the Act, with a compliance date of August 2016.

The Arkansas DHS' submission of its quarterly expenditure reports through the CMS-64 includes a certification that the Arkansas DHS is operating under the authority of its approved Medicaid state plan. However, at this time, CMS has not received information from the Arkansas DHS providing evidence of compliance with its approved state plan, section 1137(d) of the Act and regulations at 42 CFR §435.911(c).

In light of the Arkansas DHS' non-compliance with section 1137(d) of the Act, CMS is moving forward with a formal determination of substantial noncompliance with federal requirements described in section 1137(d) of the Act and the regulations at 42 CFR §435.911(c) to provide Medicaid coverage to otherwise eligible non-citizens pending verification of their satisfactory immigration status during a reasonable opportunity period if the individual meets all other eligibility criteria for Medicaid. Subject to the state's opportunity for a hearing, CMS will withhold a portion of federal financial participation (FFP) from the Arkansas DHS' quarterly claim of expenditures for administrative costs until such time as the Arkansas DHS is and continues to be in compliance with the federal requirements. The withholding will initially be three percent of the federal share of the Arkansas DHS' quarterly claim for administrative expenditures, an amount that was developed based on the proportion of total state Medicaid expenditures that are used for expenditures for eligibility determinations, as reported on Form CMS-64.10 Line 50. The withholding percentage will increase by two percentage points (i.e. 5 percent, 7 percent, etc.) for every quarter in which the Arkansas DHS remains out of compliance, up to a maximum withholding percentage of 100 percent (of total administrative expenditures). The withholding will end when the Arkansas DHS fully and satisfactorily implements a corrective action plan to bring its procedures to process eligibility determinations under its Medicaid program into compliance with the federal requirements.

The state has 30 days from the date of this letter to request a hearing. As specified in the accompanying Federal Register notice, the Arkansas DHS has an opportunity for an administrative hearing prior to this determination becoming final. However, the Arkansas DHS must request a hearing. If a request for a hearing is submitted timely, the hearing will be convened by the Hearing Officer designated below no later than 60 days after the date of the Federal Register notice, or a later date by agreement of the

parties and the Hearing Officer, at the CMS Regional Office in Dallas, Texas, in accordance with the procedures set forth in federal regulations at 42 CFR Part 430, Subpart D. The issue in any such hearing will be whether benefits are being provided during a reasonable opportunity period to individuals who have declared under penalty of perjury that they are in a to a satisfactory immigration status pending verification of such status, if they meet all other eligibility requirements, in accordance with the state plan and 42 CFR §435.911(c). Any request for such a hearing should be sent to the designated Hearing Officer. The Hearing Officer also should be notified if the Arkansas DHS requests a hearing but cannot meet the timeframe expressed in this notice. The Hearing Officer designated for this matter is:

Benjamin R. Cohen, Hearing Officer  
Centers for Medicare & Medicaid Services  
2520 Lord Baltimore Drive, Suite L  
Baltimore, MD 21244

If the Arkansas DHS plans to come into compliance with the approved state plan, the Arkansas DHS should submit, within 30 days of the date of this letter, an explanation of how the Arkansas DHS plans to come into compliance with federal requirements and the timeframe for doing so. If that explanation is satisfactory, CMS may consider postponing any requested hearing, which could also delay the imposition of the withholding of funds as described above. Our goal is to have the Arkansas DHS come into compliance, and CMS continues to be available to provide technical assistance to the Arkansas DHS in achieving this outcome.

Should you not request a hearing within 30 days, a notice of withholding will be sent to you and the withholding of federal funds will begin as described above.

If you have any questions or wish to discuss this determination further, please contact:

Bill Brooks  
Associate Regional Administrator  
Division of Medicaid and Children's Health Operations  
CMS Dallas Regional Office, 1301 Young Street, Suite 714  
Dallas, TX 75202  
214-767-4461

Sincerely,

Andrew M. Slavitt  
Acting Administrator

(Catalog of Federal Domestic Assistance Program No. 13.714, Medicaid Assistance Program.)

Dated: July 22, 2016.

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Andrew M. Slavitt

Acting Administrator

Centers for Medicare & Medicaid Services

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